STATE OF MICHIGAN
IN THE SUPREME COURT

Randall G. Paige (Deceased),
SS# 247-88-3469

Plaintiff-Appellee,

vs.

City of Sterling Heights,

Defendants-Appellants,

_____/

sc#

C.A. No: 256451

WCAC Docket No: 03 0085

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PLAINTIFF-APPELLEES BRIEF IN RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL AND PROOF OF SERVICE

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Plaintiff-Appellee answers "YES"
Defendant-Appellants answer "NO"

ARGUMENT II

THE WCAC AND THE MAGISTRATE DID NOT FAIL TO ADDRESS THE QUESTION OF DEPENDENCY. THE EXTENT OF PLAINTIFF'S SON DEPENDENCY IS IRRELEVANT IN THIS CASE. DEFENDANT IS NOT ENTITLED TO SET OF ANY LIKE BENEFITS.

Plaintiff-Appellee answers "YES"
Defendant-Appellant answers "NO

Standard of Review

Whether the WCAC misapprehended its appellate reviewing function, and whether its determination that the Magistrate's factual findings were adequately supported was conclusive in the absence of fraud. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691, 703-704, 706, 708-712, 732; 614 NW2d 607 (2000).

In *Mudel v Great Atlantic & Pacific Tea Co*, supra, the Supreme Court summarized the scope of judicial review of decisions of the WCAC:

JUDICIAL REVIEW OF THE WCAC

The judiciary treats the WCAC's findings of fact, made within the WCAC's powers, as conclusive absent fraud. If there is *any* evidence supporting the WCAC's factual findings, the judiciary must treat those findings as conclusive. MCL 418.861A(14); MSA 17.237(861a)(14).

The judiciary reviews the WCAC's decision, not the magistrate's decision. MCL 418.861a(14); MSA 17.237(861a)(14). The judicial tendency should be to deny leave to appeal from decisions of the WCAC or, if leave is granted, to affirm, in recognition of the WCAC's expertise in this extremely technical area of law. *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992).

The judiciary exercises a very narrow scope of review over the WCAC's decisions, designed to ensure that the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate. *Id.*

The judiciary continues to review questions of law involved in any final order of the WCAC under a de novo standard of review. *DiBenedetto v West*

Shore Hosp, 461 Mich 394, 401; 605 NW2d 300 (2000). *Mudel*, supra at 732. (Emphasis in original).

The Court further explained that:

> ... The judiciary is simply not empowered to look beyond the WCAC's findings of fact. The Legislature has granted to the WCAC the authority and responsibility for reviewing the magistrate's findings of fact, to determine whether those findings are adequately supported by the record. The Legislature has withheld that same authority and responsibility from the judiciary.... *Mudel*, supra at 706.
> * * *

The WCAC must review the Magistrate's decision under the "substantial evidence" standard, while the courts must review the WCAC's decision under the "any evidence" standard. Review by the Court of Appeals begins with the WCAC's decision, not the magistrate's. If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate, then the courts must treat the WCAC's factual findings as conclusive. *Mudel*, supra at 709-710 (footnote omitted).

COUNTER-STATEMENT OF FACTS

The plaintiff in this action, Randall G. Paige ("plaintiff"), deceased, was employed as a firefighter for the City of Sterling Heights ("defendant") from 1973 until he suffered a myocardial infarction on October 12, 1991. The following facts were submitted to the Magistrate in the form of a trial brief:

The salient medical facts in this matter were undisputed at the time of trial in 1991. On October 12, 1991, Randy Paige was looking forward to his 41st birthday the following day. He had undergone a cardiac stress test and general physical, required by his employer, and was found to be in excellent physical condition. Life was good.

On October 12, 1991, Randall Paige was senior firefighter on duty for the City of Sterling Heights. As the senior man, he was often called upon to fulfill the role of "acting Sergeant". On these days, his pay was adjusted accordingly. On this particular day, however, he was called upon to be in charge of the rescue rig. Ironically, this was because the crew that normally ran the Emergency Medical Unit was attending EMS training. A heated discussion took place between management and plaintiff regarding the advisability of the Department's decision. Plaintiff pointed out that it had been over fifteen years since he had been on an emergency unit, and then never in charge of one. No relief came and within a short time the first run came in. Within the next eight hours, more than ten runs came in requiring plaintiff's rig to roll. As the runs continued, the reports fell behind and by 3:30 pm, plaintiff was been nine reports with no relief in sight.

Shortly after 5:00 pm, the stress of the day crescendoed when the men

were called upon to respond to a multi vehicle accident. It was a gruesome scene, the sort that causes nightmares. Three children were trapped in the vehicle. One child, age twelve, was dead at the scene. A second child, eight years old, was embedded so deep in the wreckage that it took Randall Paige and his crew more than an hour to extract him from the vehicle with the aide of the jaws of life. The injuries were severe, with the removal taking so long that a helicopter was dispatched from U of M and the child was flown from the scene. The fate of this child is suspected, but unconfirmed.

The final child was a little three-year-old girl. With the removal being so difficult, a backboard was not an option. There were no cervical collars small enough to fit such a little child. As such, the child was lifted out of the carnage and handed to Randall Paige. At that point she whispered to Paige "my back hurts". Paige envisioned permanent spinal injuries.

There is an old phrase, "scared to death". This is literally what happened to Randall Paige on October 12, 1991. The chest pain started at the accident scene, progressing in intensity, and he was rushed to the hospital at 6:30 pm.

The 1991 infarction was found to be work related by this Bureau on June 15, 1993, opinion by Magistrate Donald G. Miller. An open award of benefits was entered.

Plaintiff requested that the Magistrate take judicial notice of Magistrate Miller's opinion dated June 15, 1993. That request was repeated to the Commission. The Commission did so. That request is repeated here to this Court. The opinion contains testimony, legal analysis, and conclusions that are

of significance to the instant litigation.

Of significance is the 1993 trial testimony given by Randall Paige. Obviously, this testimony could not have been repeated during the current litigation. It is important for this Court to understand the facts and circumstances of the previous litigation.

Of note is the testimony that plaintiff had a history of *slightly* elevated cholesterol levels (222). There was no previous family history of heart problems, and plaintiff himself had never had a heart problem. Plaintiff's lifestyle was unremarkable; he was married and a father of three children (O2).

Magistrate Miller related the following history for October 12, 1991: [it] was a particularly busy day for plaintiff. At 5:00 pm, after he had already made 7 runs, he was called upon to lead the response to an automobile accident involving 5 adults and 3 small children. A severely injured 3-year-old girl was extracted from the wreckage and plaintiff carried her to an ambulance, and then sat down in a rescue truck. He stated that he noted his right arm aching at that point. Approximately 30 minutes later, at the station, while writing the report, he began sweating profusely and experienced pain in his right arm and chest. He was transported by ambulance to South Macomb Hospital where he was diagnosed as having a myocardial infarction. He was treated and released after 9 days.

Dr. Goldberg's testimony was admitted as Plaintiff's Exhibit No. 1, and was taken on March 11, 1993. Magistrate Miller noted that Dr. Goldberg was of the opinion that plaintiff's heart attack was stress-induced on his job as a

firefighter on October 12, 1991. He stated that the damage to heart tissue was not extensive and plaintiff's prognosis was good, but he continued to have palpitations, elevated blood pressure and high levels of cholesterol. Dr. Goldberg advised plaintiff not return to his job as a firefighter (O2-3).

Defendant's exhibit No. 1 was the deposition of Dr. Thomas Petz, MD. Dr. Petz is a pulmonary disease specialist; he does not specialize in cardiology (O3).

The police and firefighters presumption provided for under Section 405 of the Act was not used in Magistrate Miller's determination. Instead, the high standards of proof required by *Farrington v. Total Petroleum,* 442 Mich 201; 501 Nw2d 761; 6 MIWCLR 2002 (1993) were used. Magistrate Miller opined that the facts of this case lead to the conclusion that plaintiff's heart attack was work-related. Plaintiff's health was described as excellent. His non-occupational factors, although containing some negative elements, were not considered significant enough to place him in a high-risk group. Plaintiff had made twice the normal number of runs on October 12, 1991. He was performing under the much higher level of responsibility as the commander of a rescue team, a rare occasion. The team responded to a particularly serious accident. He personally assisted in the extraction of a small, seriously injured child from the wreckage, knowing that a wrong move could leave the child disabled for life. Fatigue, mental stress, and physical exertion were all present to an unusually high degree on October 12, 1991. "He had a myocardial infarction, and damage to the heart was the result. The events of the day significantly contributed to plaintiff's heart injury." (5)

Plaintiff received like benefits, in the form of a disability pension until May 21, 1998, at which time the City retired plaintiff and he received a regular pension. There was subsequent litigation in the Workers Compensation Bureau regarding coordination issues. Magistrate Sloss entered a decision in 1999.

However, as a result of plaintiff's myocardial infarction in 1991, his heart sustained irreparable damage. His odds for suffering subsequent infarctions were greatly increased, and his chances of surviving were greatly reduced. There is every reason to believe that but for the work-related events of October 12, 1991, Plaintiff would have continued his life in a normal fashion. The cardiac arteries at the time of the first heart attack were minimally occluded. In light of the mild arteriosclerosis present, no treatment such as angioplasty was either suggested or done.

Plaintiff indeed suffered a second infarction on August 15, 2000. This heart attack caused yet further damage to his already compromised heart. At that time, plaintiff's physician's recommended plaintiff undergo bypass surgery. Plaintiff underwent a quadruple bypass on August 21, 2000. The bypass, although it replaced his diseased arteries, did not repair any damage already done to the heart from the first and second infarctions.

On January 3, 2001, plaintiff suffered yet another event to his heart, causing it to go into failure. Resuscitation was unsuccessful. Plaintiff was taken to McPherson Hospital in Howell, Michigan, where he was pronounced dead (this was shortly after midnight on January 4, 2001).

Magistrate Sloss, in the 2003 opinion, found that Plaintiff's first work-

related myocardial infarction was the proximate cause of Plaintiff's death, under the standards of the case law that existed at the time of his decision, and that is still the controlling case law to date.

At the time of his first infarction, Plaintiff had one dependant, Adam Paige, DOB July 28, 1983. He was eight years old. At the time of Plaintiff's death, Adam was seventeen and still a dependant.

The Defendant appealed the Magistrate's opinion to the WCAC. The WCAC affirmed the Magistrate's opinion with the modification that the death benefits are paid on a weekly basis, rather than a lump sum.

The Defendant applied for Leave to Appeal to the Court of Appeals. Leave was DENIED.

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> * * *

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ARGUMENT I

THE 1991 MYOCARDIAL INFARCTION WAS "THE PROXIMATE CAUSE" OF PLAINTIFF'S DEATH -- THE WCAC'S AFFFIRMATION OF THE MAGISTRATE'S FINDING APPLIES THE CORRECT LEGAL STANDARD AND IS SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

In this case, the WCAC and the Magistrate concurred in their opinions. The WCAC in the present case set forth at length the Magistrate's pertinent findings, reasoning and conclusion that plaintiff's work related myocardial infarction was a proximate cause of his ultimate death. It found that there was competent, material and substantial evidence to support the Magistrate's factual finding that the 1991 myocardial infarction was a proximate cause of the January 4, 2001 death.

The WCAC's affirmance of the Magistrate's decision was conclusively supported by the evidence. The Defendant in this case is requesting this court to go beyond the judicial review powers that it holds, and analyze the same evidence that the Magistrate and the WCAC relied upon to issue their opinions. The Defendant, in its Brief, has once again organized the medical testimony to shed it in a light favorable to it.

A. "The Proximate Cause" standard of law in subsequent death cases.

Defendant argues that what is in dispute is the meaning and application of the phrase "the proximate cause". The Magistrate used the correct standard for determining whether the plaintiff's work-related myocardial infarction in 1991 was the proximate cause of his ultimate death. The WCAC used the correct standard

for determining whether the findings were conclusive when supported by substantial, competent, and material evidence. These decisions were based on the testimony given by not only plaintiff's medical witnesses, but also of the Defendant's witness, Dr. Levinson. The testimony of all three witnesses regarding the effect of the first myocardial infarction and the cause of the ultimate death is clear and convincing. "[T]he findings of the Magistrate are conclusive when supported by substantial, competent, and material evidence . . . " *Goff v. Bil-Mar Foods* (After Remand), 54 Mich 507; 563 NW2d 214 (1997).

MCL § 418.375(2) of the Act provides that when a worker receives benefits and later dies, the dependant may receive death benefits if the work related injury was the proximate cause of the death. The burden of proof is on the plaintiff. This burden had been met, as decided by the Magistrate and the WCAC.

B. *Robinson* does not control what the Legislature meant by "the proximate cause" under the WDCA statute.

The Defendant's are attempting to use an opinion of the Michigan Supreme Court to change the meaning of "the proximate cause" and its application to the Workers Disability Compensation Act. This is an attempt to change the applicability of the Workers Compensation case law. This attempt is inapplicable to the case at hand, and to the WDCA.

Robinson v City of Detroit, 42 Mich 439; 613 NW2d 307 (2000), is a case involving issues of tort actions and the governmental immunity statute. The Court concluded that the individual police officers wee immune from liability because their actions were not "the proximate cause" of the plaintiffs' injuries.

The Court overruled *Dedes v Asch,* 446 Mich 99; 521 NW2d 488 (1994), and held that the phrase "the proximate cause" ***as used in the employee provision of the governmental immunity act, MCL 691.1407(2); MSA 3.996(107)(2),*** means the one most immediate, efficient, and direct cause preceding an injury, not "a proximate cause." The ruling only applies to conduct of governmental employees when subjected to individual liability." [Emphasis added].

The Court stated that "as to subsection (c) [of the governmental immunity statute], in *Dedes*, *supra* at 107, this Court effectively interpreted 'the proximate cause' in subsection (c) to mean a proximate cause.' The Court further explained that "the" proximate cause does not mean "sole" proximate cause. *Id.* We overrule *Dedes* to the extent that it interpreted the phrase "the proximate cause" in subdivision (c) to mean "a proximate cause." The Legislature's use of the definite article "the" clearly evinces an intent to focus on one cause. The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson* at pp. 458-459.

The Court went on to reason that these rules of statutory construction are especially germane in the cases before them ***because Michigan strictly construes statutes imposing liability on the State in derogation of the common-law rule of sovereign immunity***. *Johnson v Ontonogon Co Bd of Co Rd Comm'rs*, 253 Mich 465, 468; 235 NW 221 (1931); *Detroit v Putnam*, 45 Mich 263, 265; 7 NW 815 (1881). This Court repeatedly acknowledged that ***governmental immunity legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated differently."*** *Ross* at

618, 363 NW2d 641, *Robinson* at p. 460 [Emphasis added].

> "Nevertheless, the fact that the Legislature sometimes uses "a proximate cause" and at other times uses "the proximate cause" does not, of course, answer the question what "the proximate cause" means other than to show that the two phrases should not be interpreted the same way. Id. At p. 461.
>
> "[W]e conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause. (p29)

This decision clearly applies only to the governmental immunity statue. The Court had no intention that the interpretation of the phrase "the proximate cause" in the governmental immunity statute apply to the WDCA.

In fact, the Court discussed the issue of Stare decisis, and held that "In overruling *Fiser/Rogers* and *Dedes* we have given serious consideration to the doctrine of stare decisis. Stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." However, stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes [Emphasis added].

(31)

In effect, the Supreme Court recognizes that overruling its prior decision in not an act that it can perform liberally. Also, the fact that the Court overrules a prior decision, does not allow that overruling to be applied liberally as a rubber stamp.

The *Robinson* decision specifically overrules its prior decisions in *Dedes* and *Fiser/Rogers*. The Court cites the dissent in *Hagerman's v. Gencorp Automotive,* 457 Mich 724; 579 NW2d 347; 11 MIWCLR 2006 (1998) for the purpose of defining "a" and "the". The Court does not overrule *Hagerman*. It must be strictly construed that the Supreme Court had no intention of overruling *Hagerman*, and that the *Robinson* analysis does not apply to the term "proximate cause" in subsection 375(2) of the WDCA.

C. The Proximate Cause of Plaintiff's death in 2001 was his work-related myocardial infarction in 1991, under the appropriate analysis held in *Hagerman*

The correct interpretation of 375(2) is the Supreme Court opinion of Hagerman *v. Gencorp Automotive*, 457 Mich at 724-725. The Supreme Court of Michigan held:

- It is *not* necessary that the work be the *sole* proximate cause.
- "Death is within the range of compensable consequences if the injury was a substantial factor in the death, and, we acknowledge, in the absence of a universally applicable test for proximate cause . . . Such decisions will almost always turn on the facts and circumstances presented in a given case." *Id.* at 736.
- The existence of a preexisting condition that contributes to the death does not bar recovery.
- The contributory negligence of the worker is not a defense.
- "The evidentiary issue is one of remoteness, that is, whether there is sufficient evidence to show a clear and unbroken chain of causation so that the injury was a directly and substantially related cause of the death." *Id* at 738.

In *Hagerman*, the Court granted leave to appeal to examine the Legislature's use of the phrase "proximate cause" in MCL 418.375(2); MSA

17.237(375)(2), which provides for survivor's benefits ***under the worker's compensation act***. The Court stated:

> "We decline to take up the cudgel with regard to the dissent's scholarly exploration of the evils of judicial legislation or to reconsider the holding in *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). Because the circumstances of decedent's death were within the range of compensable consequences under subsection 375(2), we reverse the decision of the Court of Appeals and reinstate the decision of the magistrate." [Emphasis added].

The Supreme Court would not reconsider *Dedes* in *Hagerman* because *Dedes* was not controlling when applied to the WDCA. The Court stated:

> "We decline the invitation to reconsider *Dedes*, which involved a different context. Furthermore, the relevance of a discourse on the obligation to effectuate legislative intent is not apparent, given that the dispute here is really a matter of how the law ought to be applied to the facts. *Hagerman* at FN2 [Emphasis added].

> In *Hagerman*, the decedent's widow sought death benefits on April 12, 1990. Under subsection 375(2) of the worker's compensation act, when death is not immediate, the survivor seeking death benefits must show that a work-related injury was the "proximate cause" of the death. The magistrate awarded plaintiff benefits, concluding that the requirements of subsection 375(2) had been met by "[a] chain of medical causation [that was], although unexpected and unusual, . . . clear and unbroken." Id. At p. 725.

"[T]he findings of the magistrate are conclusive when supported by substantial, competent, and material evidence . . . ." *Goff v Bil-Mar Foods* (After Remand), 454 Mich 507, 511; 563 NW2d 214 (1997).

The Court reasoned that:

> "[F]or centuries judges, lawyers and writers have used the phrase 'proximate cause' to indicate a

cause of which the law will take notice." Perkins & Boyce, Criminal Law (3d ed), p 774. We attribute no greater or lesser intent to the Legislature in enacting § 375 than to ensure "legally recognized cause." Id. at 776. Construing the text reasonably to contain all that it fairly means, we find no basis to conclude that legally recognized cause under subsection 375(2) means sole proximate cause. We need not revisit our decision in Dedes, supra, that "[t]he word 'the' before 'proximate cause' is not to be read to limit recovery if the plaintiff or another is also a cause . . . . [or] to prevent a defendant from claiming comparative negligence . . . ." Id. at 118. Rather, for purposes of the question presented here, we need only observe that our reading of subsection 375(2) is consistent with the dictionary definitions of "a" and "the." *Hagerman* at p. 728.

The Court held:

"Recognition of the fact that "proximate cause" means, in broad terms, "primary cause," requires us to also acknowledge the existence of other legally recognizable causes. Thus, we refuse defendant's invitation to engraft the word "sole" onto the statute between "the" and "proximate cause" ***and instead look to the common law to understand the meaning of the phrase "the proximate cause" in the WDCA***. Id. At p. 728-729 [Emphasis added].

"The worker's compensation act eliminates contributory negligence (unless wilful) as a defense in death cases and thus explicitly refutes any contention that the Legislature employed the phrase "the proximate cause" in 1912 as a reference to contributory negligence principles that existed at the time. Id. At p. 730.

Thus, construing the phrase, "the proximate cause" to require sole proximate cause would contradict the common law's longstanding recognition of the fact that, "there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury." Id. Absent some persuasive support that the Legislature intended to deviate from the common law's established recognition of

concurrent proximate causation, we have neither textual nor historical basis to construe subsection 375(2) to require a showing of "sole" proximate causation. (p 13)

The Limit of Proximate Cause is a Matter of Public Policy Proximate causation is not determined by "application of some rule-of-thumb." Perkins & Boyce, supra at 779. "[S]olutions dependent upon purely mechanical rules would produce absurd results . . . ." Id. Perkins & Boyce explain the difficult task of determining the boundaries of legally recognized causation: Whether the term used is "proximate cause," "legal cause," "jural cause," or some equivalent, the idea sought to be expressed is "legally- recognized cause," which should be promptly tested by the question,—legally recognized for what purpose? The matters of policy, which determine just where the limitations of juridical recognition shall be placed upon the broad field of actual cause, are grounded partly upon expediency and partly upon notions of fairness and justice, although even proximate cause must be distinguished from the concept of responsibility. Since the boundary lines of proximate cause are governed by these considerations they may, and in fact do, vary according to the jural consequences of the particular kind of case involved. The line of demarcation between causes, which will be recognized as proximate, and those, which will be disregarded as remote "is really a flexible line." "Legal causation reaches further" in some types of cases than it does in others. It reaches further in tort actions based upon intentional harm than in those resulting from negligence, and ***neither of the boundaries so established is necessarily controlling in other types of cases, such as actions for breach of contract, those under Workmen's' Compensation Acts,*** or criminal prosecutions. Id. at pp. 733, 734, 776)

Thus, the limit of proximate cause is a question of public policy, (p.14) and its boundaries depend on the type of case in which the Court is asked to determine those boundaries.

The Supreme Court recognizes that the WDCA statute's "proximate causation" standard does not reach as far as it does in tort actions. *Robinson* clearly interprets tort liability. Furthermore, the statute discussed in *Robinson* is even further reaching, as it is a governmental

immunity statute.

Under section 375(2) of the WDCA, and the decision of the Supreme Court in *Hagerman*, public policy requires that the standard of proximate causation is that:

". . ., as a matter of public policy, *considering our historical treatment of proximate cause in tort and worker's compensation cases, that death is within the range of compensable consequences if the injury was a substantial factor in the death, and, we acknowledge, in the absence of a universally applicable test for proximate cause, that such decisions will almost always turn on the facts and circumstances presented in a given case.* See, e.g., *Stoll v Laubengayer*, 174 Mich 701, 704; 140 NW 532 (1913), Id. At pp, 734-736.

The Court refused to apply tort principles to a Workers Compensation action.

The result was that the Court found that because the work-related injury began a clear and unbroken chain of events that led to the decedent's death, the injury was a substantial factor. It was held that the magistrate applied the correct legal standard and that the conclusions were supported by competent, material, and substantial evidence on the whole record. Id. At pp., 734-736.

i. Application of the Proximate Cause under the WDCA

Under section 375(2) of the WDCA, "the proximate cause" in subsequent death cases does not require a showing of "sole" proximate causation, as defendants here would like to establish. "Thus, construing the phrase, 'the

proximate cause' to require sole proximate cause would contradict the common law's longstanding recognition of the fact that there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury. Id. Absent some persuasive support that the Legislature intended to deviate from the common law's established recognition of concurrent proximate causation, we have neither textual nor historical basis to construe subsection 375 (2) to require a showing of "sole" proximate causation. *Hagerman* at pp. 733-734.

"Section 141 excludes the decedent's contributory negligence as an intervening cause under § 375. The phrase "proximate cause" in subsection 375(2) does not exclude death benefits where the events leading to the death flow in a clear and unbroken chain of causation; thus, decedent's death falls within the range of compensable consequences. We reject the decision of the WCAC because it fails to comply with the legal requirement that the employer take the employee as he finds him, with all preexisting conditions and frailties, for the purpose of determining compensation. The evidentiary issue is one of remoteness, that is, whether there is sufficient evidence to show a clear and unbroken chain of causation so that the injury was a directly and substantially related cause of the death." Id. At p. 737.

Subsection 375(2) adopts a higher standard for awarding benefits than that adopted in § 301. Subsection 375(2) requires an analysis of whether death was proximately caused by the original injury. Id. At p. 738

Recovery of death benefits in non-immediate death cases requires an

additional hurdle beyond the "arising out of and in the course of employment" causal nexus, namely, proximate cause and the absence of intervening or superseding causes, such as decedent's wilful conduct, sufficient to break the chain of causation. Thus, for example, death by suicide, if wilful, would appear to be non-compensable under subsection 375(2). The phrase "proximate cause" is an inherently limiting phrase. Id. At p. 739

Certain general principles govern any inquiry into the applicability of a provision of the worker's compensation act. Particularly relevant here are two often-cited principles: First, the worker's compensation act is remedial in nature, and must be "liberally construed to grant rather than deny benefits." *Sobotka v Chrysler Corp* (After Remand), 447 Mich 1, 20, n 18; 523 NW2d 454 (1994) (Boyle, J., lead opinion); see, also, *Gardner v Van Buren Public Schools*, 445 Mich 23, 49; 517 NW2d 1 (1994). Second, for the purpose of determining compensability of an injury or death, courts will require that employers take their employees as they find them. *Zaremba v Chrysler Corp*, 377 Mich 226, 231-232; 139 NW2d 745 (1966). These general principles apply to both injury and subsequent death cases, as does abrogation of the defenses of contributory negligence, negligence of a co-employee, and assumption of the risk under § 141. *Hagerman,* pp. 739-740.

Subsection 375(2) likewise imposes liability without respect to fault, but requires closer examination of the causal connection. However, in concluding that the defendant's preexisting condition was the sole legally causative factor in his death, the approach taken by the Court of Appeals and the WCAC elides the

principle that an injured employee's preexisting weaknesses, here the decedent's high blood pressure, are irrelevant to the inquiry into causation, and it avoids both the legal and factual inquiry regarding independent intervening cause. Id. At pp. 740-741.

The Court held that:

> "Where there is a right of recovery due to the original injury and the disability at the time of the hearing is directly traceable thereto, the intervention of other and aggravating causes by which such disability has been increased, if the claimant is not himself to blame therefore, is no bar to his recovery. . . . The rule is thus stated . . .: "Where the immediate agency causing the death or second injury is one which the first injury rendered it essential to employ, the employer has been held liable for the resulting death or injury." [Id. at 321-322.]

The *Hagerman* Court found that the Court of Appeals and the WCAC erred in denying compensation on the legal basis that, because decedent had a preexisting condition, the results here were too remote. Id. At 742.

In *Swanson v Oliver Iron Mining Co*, 266 Mich 121, 122; 253 NW 239 (1934), the plaintiff sought death benefits. The decedent was injured in an explosion at the mine where he worked. He recovered and was able to walk on crutches, but did not work again. The decedent, prior to his death, had received compensation for the injury from 1927 until his death in 1932. Justice Potter, writing for a unanimous Court, addressed the exact issue we address today: "whether the injury suffered by . . . plaintiff's husband . . . was the proximate cause of his death . . . ." Id. at 122. The Court held: The question is whether the injury accelerated his death; whether, by reason of the injury suffered by him, his death occurred sooner than it probably otherwise would. There was testimony

indicating the injury suffered lowered his vitality and probably shortened his life. This was sufficient. [Id.]

In the present case, Plaintiff's 1991 injury clearly accelerated his death. As the testimony outlined in this brief shows, the left ventricular damage that occurred in the 1991 Myocardial infarction lowered Plaintiff's vitality and shortened his life. The evidence in the record is competent, material, and substantial, and this is sufficient.

In *Neumeier v City of Menominee*, 293 Mich 646; 292 NW 511 (1940), the Court again addressed the death benefits question of proximate cause and sustained an award of death benefits. The decedent dropped a plank on the toes of his right foot at work in 1936. He failed to seek immediate medical attention, and, within a month, gangrene developed, "necessitating the amputation of one toe." Id. at 648. The gangrene progressed and the decedent's right leg was amputated approximately one month later. While this terminated the infection, the decedent died about sixteen months later. "The causes of death were thrombosis of the popliteal artery of his left leg, chronic myocarditis, arteriosclerosis and toxemia from a tumor in his mouth." Id. at 648 (emphasis added). In determining "whether . . . there [was] any competent testimony to support the . . . award," Id., the Court rejected the argument that the death benefits statute required a showing of sole proximate causation and sustained an award under 1929 CL 8428, a predecessor of § 375: It is true that [the treating physician's] testimony does not indicate that the injury was the sole cause of death. But in view of the decisions of this court, if there is competent testimony that the injury accelerated

his death it is sufficient to be a proximate cause under the statute . . . . [Id. at 649][20]

The Hagerman Court held that:

> "The conceptual framework uniting cases involving worker's compensation death benefits claims is acceleration of death on the basis of direct causal connection with the work-related injury. Whether concluding that acceleration of death is sufficient or that a direct causal connection is required, from the earliest days of this Court's interpretation of the worker's compensation act, see, e.g., *Fitzgerald v Lozier Motor Co*, 187 Mich 660, 666; 154 NW 67 (1915), through *Oleszek* (1922), *Swanson* (1934), *Neumeier* (1940), *Byrne* (1942), and the other cases cited above, the decisions present a clear and consistent understanding of proximate cause. In view of the overwhelming weight of the authorities, within our state and elsewhere, see, e.g., *Anderson v Industrial Ins Comm of Washington*, 116 Wash 421; 199 P 747 (1921), we reject both the conclusion of the Court of Appeals in sustaining the decision of the WCAC and the sole causation approach of the dissent. Where the plaintiff can show a direct causal connection between the work-related injury and the subsequent death, or a sequence of events that, while unexpected and unusual, are not uninterrupted by causes so unexpected as to break the chain of causation, the plaintiff has met the threshold requirement for proximate cause as a matter of law under subsection 375(2). Testimony may establish a basis for finding that the death was not factually related to the original injury, but preexisting medical conditions are not sufficient as a matter of law to break the chain of causation. *Hagerman* at p. 747.
>
> "The magistrate correctly concluded that decedent's death was sufficiently traceable to the work-related injury to fall within the compensable range of consequences under subsection 375(2). The magistrate's ruling amounts to a finding that each step in the chain of causation was dependent on the existence of the work-related injury and its required treatment and that there was no intervening superseding cause sufficient to break the chain of causation. Consistent with the text of subsection 375(2), and long-established jurisprudence on the meaning of proximate cause, we decline defendant's invitation to read the phrase "proximate cause" to mean sole cause so as to yield a different result, and we specifically reject the notion that decedent's preexisting medical condition may be considered a superseding cause under these circumstances. Id. At. P. 749

"The magistrate applied the correct legal standard in considering whether the chain of medical causation was "clear and unbroken" and whether that chain established that the death resulted from "the adverse consequences of medical management of a work related condition . . . ." The evidence supported the magistrate's conclusion that the death was sufficiently traceable to the work-related injury to establish compensability." Id. at p. 749.

ii. The facts in this case clearly establish the Proximate Cause of Plaintiff's death was the work-related myocardial infarction in 1991.

Defendant asserts that the Magistrate avoided discussion of the significant issues presented regarding the immediate cause of Plaintiff's death, Including: 1) the role of the complete occlusion of the quadruple bypass, and 2) whether the mechanism of death was a myocardial infarction or an arrhythmia.

The standard for the Appellate Commission review is a search for supporting competent, material and substantial evidence of the whole record. MCL 418.861a(3) and (4). In the present case, the Magistrate found as fact that:

"It is the inescapable conclusion from the testimony of all three doctors in this matter that Plaintiff's demise is directly traceable to the initial work-related injury in 1991. All three doctors agreed that it was a combination of underlying coronary artery disease together with the cumulative damage to the heart that began with his work-related myocardial infarction in 1991 that caused the fatal arrhythmia on January 4, 2001. I therefore conclude and find as fact that Plaintiff's work-related myocardial infarction in 1991 was the proximate cause of his death for purposes of 375(2) of the act." (o2 at p. 5).

That finding was conclusively supported by competent, material and substantial evidence on the whole record and is therefore conclusive. *Layman v. Newkirk Electric Assoc., Inc.* 458 Mich 494; 581 NW2d 244 (1998).

Defendant's brief is essentially an argument in favor of those portions of

the record supporting its defense, a process in derogation of the WCAC's reviewing standard, as well as this Court's.

Using the *Hagerman* analysis both of Defendants questions are irrelevant. The Magistrate found that the work related injury (the 1991 Myocardial infarction and the resulting left ventricular damage) began a clear and unbroken chain of events that led to the decedent's death; the injury was a substantial factor.

Whether the 2001 event was a myocardial infarction or an arrhythmia is irrelevant not only under the *Hagerman* analysis, but also because either event is a "cardiac event". Plaintiff's work-related injury was a "cardiac event", which caused damage to the Plaintiff's heart and ultimately caused his death. None of the case law cited in this brief, as well as Defendant's brief, support a conclusion that the subsequent death must be an identical injury. In fact, it doesn't have to be the same at all.

At the time of trial, Plaintiff admitted the deposition testimony of his treating cardiologist, Dr. Mark Goldberg, MD (Exhibit 7). Dr. Goldberg is board certified in Cardiology (G 7). Dr. Goldberg treated plaintiff for his heart from 1991 until his death. Dr. Goldberg was the signatory on plaintiff's death certificate. The deposition testimony of Dr. Eldred Zobl, MD (Exhibit 8) was also admitted into evidence.

The testimony of Dr. Goldberg and Dr. Zobl clearly establish that plaintiff's first infarction in 1991 was the proximate cause of plaintiff's ultimate death, under the Hagerman test.

Dr. Zobl is board certified in Cardiovascular Disease (Z 7). Dr. Zobl

performed a medical record review, including: treating records from Dr. Goldberg, 1991-2000; treating records of Macomb Hospital, October 1991; treating records of Huron Valley Hospital, August 2000; treating records of Harper Hospital, August 2000; Evaluation of Dr. Korotkin, August 1992; deposition transcript of Dr. Goldberg taken in 1993 and January 2002; Autopsy report dated January 4, 2001; Evaluation from National Health Center Resources in October 2000; treating records of Dr. Bascewicz; death certificate.

Dr. Zobl testified that following the first myocardial infarction in 1991, plaintiff had sustained damage to the left ventricle (Z 16). The electrocardiogram showed an acute anterior nontransmural but apiarian infarct. There was marked increase in elevation of the ST segments with a serial pattern associated with a myocardial infarction and subsequent destruction of a portion of the myocardium (Z17). The plaintiff's cardiac enzymes were elevated. This elevation occurs only when there is myocardial damage (Z17). Post myocardial testing showed areas of nonfunctioning myocardium in the anterior wall, which was compatible with the location of the infarct (Z17). Dr. Goldberg testified that the cardiac catheterization that was performed in August 2000 revealed severe multivessel coronary artery diseases with hypokinesis of the inferior apical segment of the left ventricle. (G9). Dr. Goldberg testified that an abnormality was present on the left ventricular angiogram, which was done following his first heart attack. What was described was a small area of akinesis at the apex of the left ventricle. In 1991 it was described as akinesis which means that that portion of the left ventricle was not contracting at all, it was a small area, whereas in 2000, a the

time of the left ventricular angiogram it was described as hypo kinesis meaning it's contracting, but not as well as it should (G14-15). Dr. Goldberg opined that the fact that the left ventricle was not contracting normally in 2000 is quite likely related to the first myocardial infarction since the abnormality was present in 1991 in a similar location (G15).

When a portion of the heart muscle is nonfunctional there is a process called remodeling of the heart. This is where an area of the heart which is nonfunctioning because of destruction (i.e., death of the muscle), in this case by an infarction, the other areas of the heart have to take up that slack (Z18). It is in the nature of a compensatory mechanism (Z40). Over a period of time this causes a thickening or enlarging of those functional areas of the myocardium, reducing the overall function of the myocardium (Z17, 18). It imposes an additional workload on the functional areas of the heart (Z18). Over a period of time as the left ventricular wall thickens it can outgrow its blood supply and lead to further scattered areas of ischemia (inadequate blood supply) in the myocardium (Z18). This ischemia leads to hypertrophy (thickening, enlarging) of the functional myocardium.

It was Dr. Zobl's opinion that when a second myocardial infarction occurs, one of the most significant factors in the mortality is the history of a previous myocardial infarction (Z19). This history of a pervious myocardial infarction is a significant risk factor for the occurrence of a second myocardial infarction (Z19).

Dr. Zobl opined that it is uncertain as to the nature of the final terminal cardiac episode (Z20). The final cardiac episode may have been a third

myocardial infarction or it may have been a lethal arrhythmia, which is an episode of ventricular fibrillation, a cardiac arrest brought on by a severe ischemic episode (Z21). That was the most likely cause (z 44). Dr. Goldberg came to the same opinion. Dr. Goldberg had signed plaintiff's death certificate on January 4, 2001, listing myocardial infarction as a result of coronary artery disease, as the cause of death. However, after reviewing the autopsy report. Dr. Goldberg testified that the autopsy report indicated occlusion of all four of plaintiff's bypass grafts. The blood could not pass through the bypass grafts. When the term is used in the context in which it was used here, occlusion of the bypass grafts, implies that the grafts were totally blocked. If in fact that was the case, that would be a potential explanation for him having a myocardial infarction at the time that he died or it would be a potential explanation for him having another cardiac event such as a dangerous cardiac arrhythmia, which could have been responsible for his death (G20). The arteries may have become blocked post-mortem.

The 1991 myocardial infarction caused damage to the left ventricle, which led to remodeling of the heart, which lead to further ischemia. The ischemia could continue to progress (Z21).

Dr. Zobl testified that after reviewing all of the medical records from the first heart attack in 1991, he felt that the resulting left ventricular damage that it produced was a significant contributing or aggravating factor in the production of the second infarction and plaintiff's subsequent demise (Z24). There was nothing in the medical records that showed that the first heart attack and the

resultant ventricular damage was not the significant contributing factor (Z24).

Dr. Goldberg testified that plaintiff had a small area of damage to the left ventricle in 1991, based on the left ventricular angiogram. Since he then had a second myocardial infarction in the year 2000, and presumably a third myocardial infarction just before death, any damage to the left ventricle from any of his myocardial infarctions could have contributed in an accumulative effect to cause dysfunction of the left ventricle which could then contribute to plaintiff's demise (G22). There was a small amount of the damage to the left ventricle in 1991, which could contribute to damage from other myocardial infarctions which subsequently occur, so cumulatively the damage from each of the myocardial infarctions can contribute to the overall dysfunction of the left ventricle and can then play a role in subsequent problems or risk of subsequent events, such as risk of sudden cardiac death (G23). The effect of all three heart attacks could certainly contribute to problems which plaintiff might have experienced and would increase his risk of further cardiac problems and subsequent cardiac death. The fact that he had coronary artery disease AND the fact that he had had myocardial infarction certainly increased the risk that he would have subsequent myocardial infarction.

Defendant argues that Dr. Goldberg did not testify that cumulative damage was a cause of fatal arrhythmia. The foregoing testimony clearly supports that Plaintiff's 1991 myocardial infarction caused damage to the Plaintiff's heart and was a proximate cause of the sudden cardiac death, whether a myocardial infarction or an arrhythmia.

Defendant also seems to think it is important that Dr. Goldberg listed "acute myocardial infarction" as the cause of Plaintiff's death on the death certificate. Again, it is irrelevant here for reasons stated previously. Furthermore, Dr. Goldberg had signed the death certificate without any first-hand knowledge; he had not seen the Plaintiff or any of the records from McPherson Hospital, or the autopsy report. However, it is clear that once he reviewed the autopsy, he had much more information to conclude the cause of death. Again, this is an irrelevant issue here because there is no doubt that Plaintiff died from a sudden cardiac event.

Dr. Zobl testified as to the proximate cause of plaintiff's second myocardial infarction and last cardiac episode at pages 45-50 of his deposition transcript. Dr. Zobl opined that the final episode was an arrhythmia. The proximate cause of that arrhythmia was the coronary artery disease. The proximate cause of that arrhythmia also is the left ventricular damage that he suffered in 1991 (Z48). In this case we have **two** proximate causes, not the proximate cause. We have a proximate cause being the coronary artery disease leading to the arrhythmia leading to death and the left ventricular damage from 1991 to his death (Z49). The left ventricular damage was progressive as was the coronary disease (Z49). The left ventricular damage was shown on the cardiac catherization results in August 2000, where the left ventricle damage was now severe (G9). Both the ventricle damage and the coronary artery disease had progressed, as evidenced in the autopsy where the left ventricular wall was thickened to 1.8 centimeters. Normal is 1.1 to 1.2. 1.8 is very significant hypertrophy of that wall. When that

wall hypertrophies, the heart would be required to further remodel or work hard to compensate for that damage (Z49). The cause of death was the left ventricular damage and coronary artery disease (Z50).

When applying Dr. Zobl's opinion to the *Hagerman* standard, it is clear that plaintiff's death is compensable. It is not necessary that the left ventricular damage that was the result of the work related injury in 1991 was the *sole* cause of plaintiff's death. Dr. Zobl clearly testified that the left ventricular damage was **the proximate cause**. Coronary artery disease was only a contributing cause. Under the Statute, the death is compensable if the injury was a substantial factor in the death. The existence of coronary artery disease contributing to the death does not bar recovery. There is sufficient medical evidence to show a clear and unbroken chain of causation so that the injury was directly and substantially related cause of the death.

Defendant offered into evidence the deposition testimony of Dr. Gerald Jay Levinson, DO. Dr. Levinson is Board Certified in internal medicine. He is not Board Certified in Cardiology. Unlike Dr. Zobl and Dr. Goldberg, who concentrate their practices solely on cardiology, Dr. Levinson practices 60% internal medicine and 40% cardiology.

Defendant now attempts to re-interpret the Magistrate's interpretation of Dr. Levinson's testimony. The WCAC found the evidence supported the Magistrate's opinion.

Defendant also is re-interpreting Dr. Goldberg's 1993 testimony, which was admitted as an exhibit in the 1993 trial, but not in the 2003 trial and is also

attempting to re-interpret the Magistrate's interpretation of the testimony. The Defendant never appealed magistrate Miller's 1993 opinion, and the Defendant is barred from re-arguing evidence in this Appeal. The magistrate clearly took the fact that Dr. Levinson was not Board Certified in Cardiology into consideration when making his decision. The magistrate states "Dr. Levinson is board-certified in internal medicine, and currently practices in the field of cardiology (for which he is not board certified)". (O2 at p. 3 [Emphasis added].

Dr. Levinson performed an independent medical examination on Randall Paige on October 9, 2000, at the request of the Defendant. This was post bypass surgery. At that exam, Dr. Levinson reviewed the report of Dr. Joseph Kopmeyer dated December 9, 1999. Dr. Kopmeyer had also performed an independent medical examination on behalf of the defendant. Dr. Levinson also reviewed a report from Dr. Thomas Petz dated November 18, 1991. Dr. Petz had also performed an independent medical examination on behalf of the defendant. Dr. Petz's testimony was admitted into evidence in the 1993 trial. Dr. Levinson did not review any of plaintiff's treating medical records and/or opinions of plaintiff's treating physicians (L39).

Dr. Levinson's report is typed into the record beginning on page 11 of the deposition transcript. Dr. Levinson was of the opinion that plaintiff's etiology of his coronary heart disease is his significant risk factor profile of hypertension, hyperlipoidemia, and smoking, and was not caused by his employment as a firefighter for the City of Sterling Heights (L16). With regards to whether the latest triple bypass is related to the original injury in 1991, Dr. Levinson stated

that is "a judgment call". He continued to opine that the bypass is the result of the progression of coronary heart disease, which was documented in 1991 rather than due to the absolute original injury at that time, which did not require an intervention. He stated "so depending upon how one looks at this, you could certainly say that it is not related to the absolute injury of 1991, but rather to a progression of the disease, which was documented as being present in 1991" (G17). The fact that plaintiff had "severe" coronary artery disease at the time of the 1991 injury was an issue in the 1993 trial. Plaintiff in fact did not have severe coronary artery disease at that time. Testing showed plaintiff had 60 percent occlusion of the LED and 50 percent occlusion of the RCA. Prior medical testimony establishes this is not severe. Dr. Zobl also testified that these findings are not severe coronary disease (Z27). Dr. Zobl also testified consistent with Dr. Goldberg's 1993 testimony in the production of the infarct. According to the records what produced the infarct is that he had an ulcerated plague at that area of narrowing in the mid left anterior descending coronary artery. Plaintiff had a plaque, which ruptured, and there was an acute blood clot formed on that plaque which produced his infarct. (Z27-28)

Dr. Levinson prepared an addendum report, dated October 25, 2001, which appears in his transcript beginning on page 20. The Accident Fund had apparently provided additional medical records, which are not identified in the report. The specific purpose of the review was to form an opinion as to whether or not the death of Mr. Paige on January 4, 2001, was causally related to the myocardial infarction that occurred on October 12, 1991 (L21). Dr. Levinson

stated that the answer to that question depends on from which perspective you approach this case. He artfully stated "Specifically, if you ask me whether or not the original myocardial infarction caused Mr. Paige's most recent demise, the answer would be no. What caused Mr. Paige's immediate demise was the fact that all graft of his fairly recent coronary artery bypass surgery were occluded" (G21) [which, according to the Medical Examiner, happened after the death]. Dr. Levinson reasoned that it depends on which perspective you are approaching this from because he did not feel that the initial myocardial infarction was caused by plaintiff's job, but by his history of excessive smoking, family history for coronary artery disease, hyperlipidemia, male gender and being overweight" (L22), all facts which are irrelevant in the instant litigation, since that issue was determined in 1993 and cannot be an issue in this appeal.

It does not matter whether or not Dr. Levinson feels that the 1991 event was work related or not. This has been decided by the decision of Magistrate Miller, based on medical testimony. However, it should be noted that Dr. Levinson testified that although the plaintiff's occupation of firefighter did not cause the coronary artery disease, it did precipitate the 1991 heart attack (L52). Second, Dr. Levinson developed this opinion solely from independent medical examination reports of prior doctors hired by this defendant to defend the original claim. Dr. Levinson did not review any treating medical records to form an opinion. Third, and most importantly, at the time of the initial myocardial infarction, plaintiff did not have hyperlipidemia, did not have hypercholesterolemia, and was not overweight. There is no family history of

coronary artery disease. Plaintiff's father died at the age of 72 from an unknown cause, certainly not believed to be coronary artery disease. Plaintiff's mother is still living today at age 80. She has no history of coronary artery disease. Plaintiff's three siblings are still living today with no history of coronary artery disease. That only leaves male gender and history of smoking (L53). Nevertheless, this opinion is unfounded and without merit. Dr. Levinson also testified to a risk factor that plaintiff had a ventricular tachycardia exercise induced, so had a propensity towards arrythmia. This was noted in medical records. However, it should be noted that this was an issue in the 1993 trial. Plaintiff had undergone an exercise induced stress test days before the 1991 heart attack. The results were normal and there was no evidence of ventricular tachycardia. This finding did not result until post 1991 myocardial infarction and the resulting damage to the left ventricle. Dr. Levinson again artfully eludes questioning on this issue. He states that it doesn't surprise him that you could have a normal stress test just prior to a myocardial infarction.

Dr. Levinson was then asked whether the fact that there was a normal stress test, a myocardial infarction, and then an abnormal stress test shows that the disease has progressed. Dr. Levinson answers this question by first by stating that the risk factor profile has changed, something is different "you're quite correct and the disease has either progressed . . . Or that area that had a previous small scar in it, it causes what we call a reentry where an arrythmia can occur under these circumstances" (59). Dr. Levinson concedes, "it does imply a progression of a problem whether it's primarily coronary artery disease

progressing or whether it's the fact that there was a very small area of damage that now causes a re-injury is debatable, **but something has changed for the worse**. That's true. I agree." (L59)

Dr. Levinson reiterated his opinion by stating that "it depends on which way one views the issue as to whether the glass if half full or half empty" (L23). Dr. Levinson admits that this is a convoluted answer. It is a philosophical point of view as to how to approach this issue (L23). This is a classical opinion of an independent medical examiner that is being paid to form an opinion that is going to favor the defendant, and is having a difficult time rationalizing his opinion.

In Dr. Levinson's deposition, defense counsel states that the records given to Dr. Levinson for review after plaintiff's death were: Harper Hospital, Huron Valley Hospital, and Dr. Goldberg. Apparently, there were no records provided from Macomb Hospital, where plaintiff presented on October 12, 1991 and underwent treatment and testing.

Dr. Levinson also discussed the process of remodeling that Dr. Zobl testified to. The doctor was asked how kinesis of the left ventricle in 1991 and hyperkinesis of the left ventricle in 2000 "enter the picture". Dr. Levinson testified that hypokinesis is a decrease in contractility or a decrease in myocardial contraction or function in a particular area. Other areas may take up that job of that area if there's enough myocardial reserve in the remaining tissue to compensate for that (L30, 42, 43). The other areas become overactive because they try and compensate for this area (L30). It was Dr. Levinson's understanding from a review of the records that there was such compensation in plaintiff.

Taking the remodeling and the damage that had been done, Dr. Levinson was of the opinion that further ischemia occurred, because plaintiff had a second myocardial infarction (L60).

When questioned why Dr. Levinson stated that the relationship between the 1st myocardial infarction, the 2nd myocardial infarction and the 3rd cardiac event is a judgment call, he stated that someone else might say that one myocardial infarction has an increased incidence of having another so that you could say on a pure statistical basis you could say they might be related only because prognostically if you have one heart attack your chances of having another one are greater than if you hadn't had the heart attack at all (L39). This fact is well known, and was reiterated by Dr. Zobl in his testimony (Z19). Dr. Levinson goes on to say that that is true only if there was major cardiac damage with a decreased ejection fraction and complications (L39). This statement is without merit. Plaintiff had a major myocardial infarction on October 12, 1991. It was treated with thrombolytics, which dissolved the plague. The fact remains that plaintiff-suffered damage to his left ventricle as a result of the 1991 myocardial infarction, which is documented in the medical records and testified to by all three testifying physicians. Dr. Levinson stated that once you have a myocardial infarction in a particular area and unless the blood supply was not completely terminated to that area, but was only temporarily terminated, then opened, then you have a further progression of disease with decreased blood supply and ultimately lack of blood supply to that area leading to progression of the damage that was caused to the heart from the myocardial infarction (L44, 45)

Finally, Dr. Levinson was asked whether the coronary artery disease coupled with the left ventricular damage is the proximate cause of the arrythmia that he suffered in January of 2001. Dr. Levinson opined, "Yes. In a simplistic generic primary sense, yes, without getting complicated. Yes." (L60-61) Dr. Levinson agreed with Dr. Zobl's opinion that the coronary artery disease *coupled* with the left ventricular damage was the proximate cause of plaintiff's second myocardial infarction and his ultimate demise. Ultimately, it comes back to coronary artery disease progression and previous myocardial damage (L68).

Dr. Levinson's opinion that the Plaintiff's death was not a result of the first myocardial infarction is that the first myocardial infarction was not work related. Dr. Levinson clearly stated, though, the coronary artery disease **and** the 1991 myocardial infarction were the proximate causes of Plaintiff's death. As stated in Hagerman, decedents pre-existing condition may **not** be considered under these circumstances.

Dr. Zobl and Dr. Goldberg's testimonies are clearly more persuasive. Dr. Goldberg treated Plaintiff since 1991. Dr. Zobl is a highly qualified cardiologist. Dr. Zobl performed a very thorough record review, reviewing all treatment records dating back to the 1991 myocardial infarction, as well as the IME reports of Dr. Petz and Dr. Levinson.

Dr. Levinson is clearly under qualified and his testimony in unpersuasive. Dr. Levinson, although he did perform an IME in October 2000, is not board certified in cardiology. He is certified in internal medicine. The records reviewed by Dr. Levinson only consisted on Dr. Petz's previous IME reports and the

autopsy. It should also be noted that Dr. Petz, who testified on behalf of the Defendant's in the 1993 trial, is also not board certified in cardiology – he is a pulmonologist.

In conclusion, Magistrate Sloss did not "resort to speculation" as the Defendant asserts. It is clear from the medical records and from the testimony of all three doctors that the Plaintiff suffered left ventricular damage as a result of the 1991 myocardial infarction, a work-related injury. This injury created the clear and unbroken chain of events, and was the proximate cause of Plaintiff's death, pursuant to section 375(2) of the WDCA.

ARGUMENT II

THE WCAC AND THE MAGISTRATE DID NOT FAIL TO ADDRESS THE QUESTION OF DEPENDENCY. THE EXTENT OF PLAINTIFF'S SON DEPENDENCY IS IRRELEVANT IN THIS CASE.

A. SURVIVOR'S BENEFITS

Section 345 of the Act provides a burial allowance of up to $6,000.00 and Section 321 provides wage loss to surviving dependants.

Plaintiff's wife, Melody Paige, incurred the burial expenses, which were well above the maximum amount. Mrs. Paige paid the funeral home over $11,000.00 for services rendered for funeral services and burial. A funeral plot was purchased at the Hartland Cemetery, from Hartland Township. A headstone has not been purchased, but is an inevitable expense.

The WCAC also affirmed the Magistrate's decision that Melody Paige was entitled to the statutory burial expense. However, the Commission did modify the amount to be paid to reflect the amount allowed at the time of the original injury

in 1991 ($1,500.00).

As previously stated, plaintiff had one dependant, Adam Paige. Section 321 states that when there is a period of disability followed by death, the 500-week limit still applies and the employer receives credit for benefits paid during the disability. Section 375(2) provides that the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid . . . To make the total compensation for the injury and death . . ., **equal to the full amount which such dependants would have been entitled to receive . . . In case the injury had resulted in immediate death.** [Emphasis added]

"In *Boyer v. Monarch Welding*, 1996 Mich ACO 1098, 9 MIWCLR 1242 (1996), the commission pointed out that the limit is not based on a number of weeks paid, but the sum of the benefit's the dependants would have been entitled to receive during 500 weeks. This becomes especially signification if the coordination of benefits is involved. Workers Compensations Disability benefits are coordinated or reduced on the basis of other benefits that the worker receives, such as pension or Social Security. **Death benefits, however, are not subject to coordination. We must look at the amount the worker received. Employer receives credit for the amount they actually paid."** [Emphasis added].

In this case, Plaintiff never received compensation benefits. Rather, Plaintiff was paid disability pension then regular pension (resulting in the 1998 litigation). These benefits were like benefits (O6), which fully offset the workers compensation benefits. Plaintiff's workers compensation rate was $430 per

week, as ordered by Magistrate Miller in his 1993 opinion.

Had plaintiff died immediately after the 1991 infarction, Adam Paige would have been entitled to 500 weeks of benefits at $430, the sum of which is $215,000. Defendant is entitled to credit the amount they actually paid, which is ZERO.

Defendant argues that this result is double liability for the Defendant. However, this is not true. The WDCA specifically calls for this result. That is precisely the reason there is a statute that discusses death benefits, and the fact that they cannot be offset by like benefits.

The WCAC also correctly affirmed that Adam Paige was entitled to 500 weeks of benefits. Again, this award was modified in that the Defendant was ordered to pay the benefits on a weekly basis.

B. DEPENDENCY

It is irrelevant in this matter whether plaintiff's son, Adam, was wholly or partially dependent on the plaintiff. Under Section 331, Adam was a presumed dependent because he was under sixteen years old on October 12, 1991 (he was eight years old).

Section 341 of the Act states that questions as to who constitutes a dependent and the extent of their dependency ***shall*** **be determined as of the date of the injury to the employee, and their right to any death benefits** ***shall*** **become fixed as of such time**, irrespective of any subsequent change in conditions except as otherwise specifically provided in 321, 331, and 335. Section 321 would not apply since Adam would not have reached age 21 before

the expiration of the 500 weeks. Under 331, Adam would have been a conclusively presumed dependant, as he was eight years old and living with the plaintiff at the time of the 1991 injury. Adam continued to live with and be dependant on the plaintiff until his death. Section 335 does not apply since the 500-week period did not end before Adam's eighteenth birthday. Furthermore, and most importantly, the fact that Adam reached age eighteen does not mean that payments can be ceased. Section 341 is unambiguous; Adam's right to death benefits became fixed on the date of the injury to plaintiff, October 12, 1991. It does not matter that the 1993 opinion of dependency was in the context of a disability case, because section 341 in unambiguous that dependency **shall** be determined as of the date of the injury and death benefits **shall** be fixed as of that time. [Emphasis added]

The Supreme Court of Michigan has interpreted this language in *Bay Trust Co. v. Dow Chemical Co.*, 39 Mich 244 (1949), Decedent had received an injury to a toe of his right foot on June 18, 1943. Complications later set in and the toe was amputated in May of 1944. Further complications caused the entire right leg to be amputated on July 7, 1944. Decedent was awarded benefits for total disability from April 15, 1944 to July 7, 1944 and a further award of $21 per week for a total of 200 weeks from July 7, 1944 for the specific loss of a leg. Plaintiff died on July 8, 1947, his only dependent applied for compensation. It was alleged that the amputation of the right leg contributed to decedent's death. Dependent was awarded $19/week for a period of 400 weeks (the number of weeks allowed under the statute in 1949), less the amount of compensation paid

to decedent during his life. The award was affirmed on review by the full commission.

Defendants, in *Bay Trust* raised two issues on appeal. The first issue was whether the commission erred in it's finding that the injury received on June 18, 1943, caused or contributed to the death of the deceased. The Court affirmed the commission's opinion stating "the record clearly indicates that the deceased's difficulty with his right leg has been a continuous process since his injury. The amputation checked its progress to some extent but did not stop the continuous working of the condition aggravated and accelerated by the injury."

Second, the Defendant's argued that the award was incorrectly computed. The Court stated that the dispute arises over the date on which a dependant's right to compensation becomes fixed.

The Supreme Court interpreted the statute to determine the dependant's right to benefits. The Court held that the "right of dependants to compensation arises under the statute as of the date of the injury as that is that date on which dependency is determined. Also the statute expressly provides that their right to death benefits becomes fixed at such time. The court has, in prior decisions, defined death benefits as those benefits provided by the statute on the death of the employee *other than* dependency compensation. However, the statute makes no such distinction, but clearly includes dependency compensation in the term death benefits." *Id* at 247.

In *Sackolitz v. Mid-West Abrasive Co.*, 322 Mich 666 (1948), the Supreme Court held that dependency is determined as of the date of injury, not the date of

death. Decedent was injured September 28, 1945, was totally disabled, and died on February 27, 1948. At the time of his injury in 1945, the employee was a widower with no dependants. Sometime between his injury in 1945 and his death in 1948, he re-married. His widow applied for benefits. The Court held that there were no dependants who could be recognized under the terms of the Act because dependency is determined as of the date of the injury.

This issue was also decided in *Runnion v. Speidel*, 270 Mich 18 (1934). The issue was whether a child under 16 years of age at the time that their parent is injured, but over 16 at the time of the death of the parent from the injuries is entitled to the conclusive presumption of dependency. Runnion was injured on November 28, 1928. He was awarded compensation for 10 weeks on March 3, 1931. He applied for further benefits on December 14, 1932, but died on July 7, 1933, before his petition was heard. Anna Runnion, who claimed to be his wife filed and was denied benefits. However, the department found that two daughters, the children of a deceased wife, were conclusively presumed to be dependants and entitled to benefits.

In making their decision, the Court relied on Section 8421 (341), and Section 8422 (331). The Court held that whether or not a person is one of a class of dependants is to be determined . . . As of the date of the accident, and not as of the date of the death of the injured employee. In this case, the two children at issue were not conclusive dependants at the time of the injury as they did not reside with the employee, and they were the children of a former spouse, not his own children.

Defendants, in this case, suggest emphasis on the language "and under the age of sixteen at the time of their father's death", under *Runnion*. The problem is that in *Runnion*, the daughters were not **presumed** dependents at the time of the original injury and were not under the age sixteen at the time of their father's death. They were adopted *between* the date of injury and his subsequent death. Here, Adam was a presumed dependant, so there was no subsequent change in conditions. Therefore, the Magistrate in this case did not err in holding Adam as a dependent (as affirmed by the WCAC) and whether Adam was wholly or partially dependant is irrelevant.

At the time of the initial heart attack, Adam Paige was a dependent. As of the time of Plaintiff's death, Adam was seventeen, in high school, and a dependant.

CONCLUSION

For the reasons stated above, the Magistrate did not err in his decision, and the WCAC did not commit error in affirming, that the Plaintiff's work-related injury of October 12, 1991, was the proximate cause of his death on January 4, 2001, under the correct standard of law, pursuant to section 375 (2) of the WDCA. The findings of fact were consistent with the evidence on the record, and were supported by competent, material and substantial evidence on the whole record.

There was no legal error in awarding the dependant, Adam Paige, death benefits. The decisions were based on an unambiguous statute and sound, supporting case law that dependency is determined at the time of the original

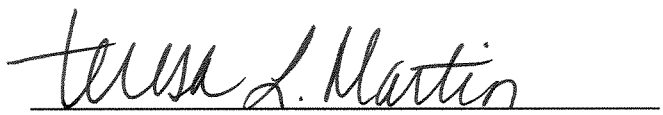
injury (1991), and that the Defendant is not entitled to coordinate benefits.

To conclude, the WCAC in the present case carefully examined the record and the Magistrate's decision, and gave due deference to the fact-findings of the Magistrate. It clearly did not misapprehend its administrative appellate role and properly applied the substantial evidence test. Its fact-findings were conclusively supported. Nor did it commit any error of law. The Commission's Opinion and Order should be affirmed.

RELIEF REQUESTED

Wherefore, Plaintiff-Appellee, respectfully requests that the Court of Appeals deny Defendants-Appellants Application for Leave to Appeal for lack of merit in the grounds presented.

RESPECTFULLY SUBMITTED



TERESA L. MARTIN (P60939)

February 17, 2005